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In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 759 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, SYSTEM COUNCIL U-4,
Petitioners,

vs.

SALLY HECHLER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The Union's statement of the case is accurate, with the exception of its truncated description of the duties ascribed to the Union in Sally Hechler's state-law complaint (J.A. 3-6).[1] Repeatedly throughout its brief (*e.g.*, p. 3) the Union acknowledges only those parts of Hechler's complaint which invoke its collective-bargaining agreement with the Company, omitting Hechler's explicit allegation

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1. Equally truncated (brief at 5-6) is the Union's two-sentence description of the court of appeals' opinion (Pet. App. 11a-32a), which does a serious disservice to that court's thoughtful consideration of the issues in question.

of additional duties arising from "the relationship by and between the said Defendants and the Plaintiff whereby the Plaintiff, SALLY HECHLER, was a dues-paying member of the said Defendants" (J.A. 4). In part because of that "relationship," Hechler charged that "the Defendant owed the Plaintiff the duty to assure that the Plaintiff was provided safety in her work place and a safe work place, and further, [that] the Plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience or to work in an area which was not safe as commensurate with her training and experience" (*id.*).

In this context, the Union's repeated attempt to disclaim any contractual obligation to protect Sally Hechler's safety (*e.g.*, brief at 7, 22) is particularly inappropriate. It would be inappropriate even if Hechler's claim were grounded solely in her status as a third-party beneficiary of the Union's contract with the Company, because the question of the Union's duty to Sally Hechler has not yet been litigated in any court.[2] It is particularly inappropriate because the Union's discussion of this extraneous question is confined to the language of its contract with the Company, while Hechler's proof will also explore both her formal and practical relationship with the Union itself. We trust that the Court will appreciate the Union's diversion for what it is—a suggestion that this case really isn't important, because Hechler is bound to lose it eventually. That suggestion, which of course we reject, is irrelevant to the issues before the Court.

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2. Even assuming *arguendo* that this question of duty would have been appropriate as a basis for dismissal, which is the only motion at issue here, the fact is that the Union did not raise it in its motion to dismiss (Record at 65-89), and the district court did not consider it (Record at 119-23).

SUMMARY OF THE ARGUMENT

On the basis of a single pleading, the Union would deny Sally Hechler her right of access to Florida's common law of negligence, which in countless other contexts provides a standard for prescribing the duties arising from relationships such as those at issue here. Despite the breadth and generality of Hechler's complaint, and the many alternative sources of duty which it embraces, the Union would close the state court's door at the threshold, for reasons which all reduce to a presumptive distrust of the independence of Florida law and the integrity of Florida courts. The Union insists that Hechler's charge of negligence is only the mask of a contract claim under the collective bargaining agreement—a claim clearly committed to the scrutiny of federal common law under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185;[3] that Florida's common law amounts to little more than the trapping of this disguise; and that Florida's courts must bow before the banner of federal supremacy which the Union so insistently waves.

At this early stage of the litigation, the Union's argument necessarily is based on mere assumption—that Florida courts are unwilling or unable to hold the law of negligence to its own true course, and are unprepared or ill-disposed, notwithstanding their constitutional duty, to respect federal law. That assumption is wrong. It is wrong because under Florida law, the Union's duty to Sally Hechler may exist independently of its collective-bargaining agreement with the Company, and may be enforced without reference to that agreement. It is wrong because the Florida courts

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3. *See Local 174, Teamsters v. Lucas Flower Co.*, 369 U.S. 95 (1962); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

are entirely capable of fulfilling their constitutional obligation to enforce federal law where it applies. And it is wrong because Sally Hechler's state action—whether based on state-created duties existing independently of the collective-bargaining agreement, or upon the federal law which governs the duties prescribed by that agreement—may be prosecuted free of any interference with the important values protected by the federal labor laws.

In this light, the Union's pietistic invocation of the federal labor laws reduces to mere speculation—that Hechler's suit might conceivably put at risk the uniformity of the common law of collective-bargaining agreements which the federal courts enforce under §301, or perhaps circumvent the important dispute-resolution procedures which those laws encourage. As the Union would have it, these theoretical risks are enough to displace state law; questions of probability or degree are evidently beside the point.

Acceptance of this position would elevate federal law to a level of supremacy which enjoys no analogy in any other context. It would uphold the dismissal of Hechler's action, despite "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4] It would act upon mere assumptions about state law, even though the federal courts should have "little confidence in our independent judgment regarding the application of [state] law . . . ." *Railroad Commission v. Pullman*, 312 U.S. 496, 499 (1941). It would deny a state

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4. *Connelly v. Gibson*, 355 U.S. 41, 45-46 (1957). *Accord, Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

court jurisdiction, despite the pervasive Congressional "desire to permit state courts to try state cases free from interference by federal courts"[5]—a desire which reflects "[t]he seriousness of federal judicial interference with state civil functions . . . ."[6] It would assume the worst about our state courts, even though the "[p]rinciples of comity in our federal system require that state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on federal law, or if the litigation is wholly private, construing and applying the applicable federal requirements."[7] And despite bearing the burden to sustain its own affirmative defense of pre-emption,[8] the Union would foresake the central purpose of pre-emption—to grapple "not with the theoret-

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5. *Younger v. Harris*, 401 U.S. 37, 43 (1971).

6. *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975). *See generally Ohio Civil Rights Commission v. Dayton Christian Schools*, 54 U.S.L.W. 4860, 4862 (U.S. June 27, 1986); *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977); *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Younger v. Harris, supra*, 401 U.S. at 44-45.

7. *Webb v. Webb*, 451 U.S. 493, 499 (1981) (federal question must be presented to state court before Supreme-Court review, because state court may find a way to avoid the question). Thus for example in *State Tax Commission v. Van Cott*, 306 U.S. 511 (1939), this Court remanded to the state court the question of whether its construction of a state statute exempting governmental salaries from state income tax was based upon state law, or instead upon the command of the supremacy clause, in light of a Supreme-Court opinion on a constitutional question, which opinion had since been overruled. In an apparently-unreported opinion, the state court rested its interpretation solely in the language of the statute, thereby avoiding the constitutional question. *See* Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 Harv. L. Rev. 1498, 1506 & n.46 (1953). *See also Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (abstention required if the state act in question is susceptible of an interpretation which would avoid the constitutional question).

8. *See International Longshoremen's Association v. Davis*, 54 U.S.L.W. 4512, 4517 (U.S. May 27, 1986).

ical disputes but with concrete and specific issues raised by actual cases."[9]

As many of the foregoing citations demonstrate, these general standards are no less applicable in the labor-law context: "[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 (1978). Thus, despite its "powerful" "pre-emptive

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9. *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) ("They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us"), *citing United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940) ("Constitutional questions are not to be dealt with abstractly"). *Accord, Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 501 (1984) (absent evidence of "congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law"); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201 (1978) (question not whether it is "theoretically possible" that an issue may be decided in two forums, but whether there is "in fact" a "risk of overlapping jurisdiction"); *DeVeau v. Braisted*, 363 U.S. 144, 152 (1960) (plurality opinion) ("Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy"), *quoted in Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 508 (1984). *Accord, Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ____, 105 S. Ct. 2380, 85 L. Ed.2d 728, 745 (1985). *See generally Wardair Canada, Inc. v. Florida Dept. of Revenue*, 54 U.S.L.W. 4687, 4688 (U.S. June 18, 1986) ("[W]e have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of congressional intent to pre-empt the specific field covered by the state law").

force," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), not even the talismanic §301 should displace these central rules of federal/state relations. Even here, the "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed.2d 206, 213-14 (1985) (hereinafter "*Allis-Chalmers*"), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

It is ironic that the Union would lean so heavily upon *Allis-Chalmers*, which illustrates the kind of practical balancing of interests which the Union's brief eschews, in preference for the mere incantation of general principles. First, *Allis-Chalmers* forbade the application of Wisconsin state law only after concluding that the state tort action was "firmly rooted in the expectations of the parties that must be evaluated by federal contract law."[10] Because the very point at issue was thus encompassed by §301, and because such questions must be resolved under a uniform body of federal law, *see Local 174, Teamsters v.*

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10. 85 L. Ed.2d at 219. The Court rejected the Wisconsin courts' conclusion that wholly apart from any interpretation of the collective-bargaining agreement, state law might punish the failure to perform a contractual obligation in good faith, since the very recognition of such a state-law duty of good faith itself would embrace "assumptions about the scope of the contract provision which [the state court] had no authority to make under state law." *Id.* at 217. To the contrary, because §301 is broad enough, by ordinary principles of contract, to encompass claims based upon both express and implied contractual obligations, the state action clearly adjudicated issues cognizable under §301: "[I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and if so, whether Allis-Chalmers' conduct breached that implied contract provision." *Id.* at 218.

Lucas Flower Co., 369 U.S. 95, 103-04 (1962) (hereinafter "*Lucas Flower*"), the Wisconsin courts' application of state law was impermissible. *Allis-Chalmers*, 85 L. Ed.2d at 214-16. At the same time, however—consistent with its earlier acknowledgment that §301 does not displace every state action "merely relating to a contract within [its] coverage," since some such actions may disclose a "connection" with the collective-bargaining agreement "too attenuated" to implicate federal concerns, *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 25 n.28, 27 n.32 (1983)—the Court acknowledged in *Allis-Chalmers* that "it would be inconsistent with congressional intent under [§301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 85 L. Ed.2d at 216. In contrast, the Union here would forbid the state action merely because it might theoretically require resort to the collective-bargaining agreement, even though there are several alternative sources of duty under state law.

Second, *Allis-Chalmers* reached this Court only after the Wisconsin Supreme Court had expressly disclaimed any obligation to incorporate federal law into the state cause of action—a commonplace and unobjectionable event in our federal system—and therefore had defied the command of the supremacy clause.[11] In contrast, the Union here has removed the case and secured its dismissal before any Florida court has had the opportunity to play its proper role in our federal system. Even if the Union were correct that Sally Hechler's claim necessarily embraces matters committed to federal law, there is no reason for believing (apart from the Union's cynicism) that the state court

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11. *Lueck v. Aetna Life Ins. Co.*, 112 Wisc.2d 675, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985).

would defy the supremacy clause and insist upon state law instead.

In this respect, the instant case may be no different from *Lucas Flower,* in which, as in *Allis-Chalmers,* the highest state court had affirmed a judgment under state law. *Lucas Flower,* 369 U.S. at 97. The holding of *Lucas Flower* is **not** that the entire state action was pre-empted by §301. The holding is that state law must give way on those **aspects** of the controversy committed by §301 to a uniform interpretation under federal law: "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring **issues** raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy." 369 U.S. at 103 (our emphasis).[12] By its plain language, *Lucas Flower* simply requires the state court to enforce federal law where appropriate. Indeed, noting that the propriety of the state court's damage award was not at issue, 369 U.S. at 97 n.2, this Court **affirmed** the state judgment in *Lucas Flower,* because the result reached in the state action was consistent with the requirements of §301. The lesson of *Lucas Flower* is that, unless it is somehow **otherwise objectionable,** a state action is permissible even if it embraces issues cognizable under §301, so long as the state court applies federal law to those issues. Even

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12. *See id.* at 103 (our emphasis) ("We hold that in a case such as this, **incompatible** doctrines of local law must give way to principles of federal labor law"); 104 (our emphasis) ("[W]e cannot but conclude that in enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over **inconsistent** local rules"). Even *Allis-Chalmers* says that the Wisconsin court had applied state law to make assumptions about the contract which it "had no authority to make under **state** law," 85 L. Ed.2d at 217 (our emphasis), suggesting that it might have had the authority to make them under **federal** law. As we note in a moment, the Wisconsin court was held to lack that authority for other reasons—not because it was incapable of applying **federal** law.

the presumptive involvement of federal questions is no warrant for pre-emption.

The third aspect of *Allis-Chalmers* is that even if the Wisconsin court had applied federal law on the question of liability, the mere availability of the state action was offensive to the purposes of the federal scheme—which explains why the Court found the action to be pre-empted rather than, by analogy to *Lucas Flower*, remanding it to state court with instructions to apply federal law.[13] In *Allis-Chalmers*, the employee could have initiated a grievance procedure, culminating in binding arbitration, to remedy the union's administration of his disabliity claims, but instead sought relief in state court. 85 L. Ed.2d at 210-12. In contrast to the federal §301 action, *see id.* at 220, the state court required no exhaustion of this grievance procedure. Of course, encouragement of grievance arbitration is a central policy of federal labor law,[14] and thus the mere existence of the state remedy was inconsistent with the federal scheme: "[T]he arbitrator's role in every case could be bypassed easily if §301 is not understood to preempt such claims." 85 L. Ed.2d at 220.[15]

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13. As the Court noted in *Allis-Chalmers*, 85 L. Ed.2d at 214: "The question posed here is whether this particular Wisconsin tort, as applied, would frustrate the federal labor-contract scheme established in §301."

14. *See id.* at 220-21; *Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983); *Clayton v. International Union*, 451 U.S. 679, 686-87 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965).

15. In this respect, *Allis-Chalmers* was foreshadowed by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), in which the worker by-passed the grievance procedures provided by the collective-bargaining agreement, and brought a state contract action against the employer for severance pay, in which he was not required to exhaust the grievance procedures. *Id.* at 650-52. As in *Allis-Chalmers*, the state action was offensive to the federal system whether or not it purported to apply federal contract law. *See id.* at 653-54.

But the Union here has renounced such a practical assessment of the state action's impact upon federal interests, preferring instead to conjure hollow images of supremacy. As we will demonstrate, that was the only tactic available: Sally Hechler's state action will not deter or interfere with the pre-accident dispute-resolution procedures sanctioned by the federal labor laws; it will not punish any conduct which Congress intended to leave unpunished; it will not interfere in any way with the important values which underlie the federal labor laws. In short, this case is plainly not *Allis-Chalmers*. The court of appeals was right to hold that Sally Hechler should have her day in state court.

Even if all the foregoing arguments are rejected by this Court, the Union is still wrong in claiming that Hechler's complaint was time-barred. Even assuming that Hechler is remanded to a §301-claim and no other, the district court was wrong to apply the statute of limitations prescribed in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). As the Court noted, 462 U.S. at 165, the *DelCostello* suit was "not a straightforward breach-of-contract suit under §301 . . . but a hybrid §301/fair representation claim, amounting to 'a direct challenge to "the private settlement of disputes under [the collective-bargaining agreement]." ' "[16] But the instant suit would not be similarly analogous to an action challenging some prior dispute-resolution process, but is much more like a state action for breach of contract or negligence. In no event should *DelCostello* apply, and for that reason Hechler's claim was not time-barred.

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16. *Id.* at 165, *quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring), *quoting Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966).

ARGUMENT

I. Sally Hechler's State-Law Tort Action Is Not Pre-Empted by §301 of the Labor Management Relations Act.

A. Hechler's Complaint Invokes Common-Law Duties Which Arose Independently of the Union's Collective-Bargaining Agreement With the Company. The Union repeatedly insists (*e.g.*, brief at 9, 15-16 & n.5, 20 n.9) that the only state-law negligence claim available to Hechler is one based upon the Union's duties under its collective-bargaining agreement with the Company. To sustain its heavy burden on this point, the Union merely invokes this Court's declaration in *Allis-Chalmers* that the tort claim there was nothing "more than a way to plea a certain kind of contract violation in tort in order to recover exemplary damages," 85 L. Ed.2d at 219; and then cites a handful of Florida cases which purport to establish that tort and contract law in Florida are interchangeable (brief at 15-16 & n.5, 18 n.7). But this case is not *Allis-Chalmers;* Sally Hechler's claim is not a contract case in tort's clothing; and the Union's lawyers have spent too little time with Florida law.

At the threshold, the Union is clearly wrong to say that tort actions and contract actions in Florida are no different. To the contrary in Florida, "a breach of contract, alone, cannot constitute an action in tort." *Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co.*, 11 Florida Law Weekly 283 (Fla. 3rd DCA February 7, 1986). The contract is a "mere inducement, creating the state of things which furnishes the occasion of the tort, but not the basis for recovery for it, and in all

such cases the remedy is an action *ex delicto* on the case."[17] Thus, even when the tort action is based on the negligent performance of a specific contractual obligation, there are vast differences in Florida between prosecution of the action in contract and in tort.[18] It is not surprising, there-

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17. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893, 895 (1932). *Accord, Douglas v. Braman Porsche Audi*, 451 So.2d 1038, 1039 (Fla. 3rd DCA 1984); *Navajo Circle, Inc. v. Development Concepts*, 373 So.2d 689, 691 (Fla. 2nd DCA 1979) ("[T]he duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise"); *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. 4th DCA 1970).

18. In addition to the tort plaintiff's obligation to prove negligence in the performance of a contractual obligation, *see* note 17, *supra*, Florida recognizes significant differences between contract damages and tort damages. *Compare A.M.R. Enterprises, Inc. v. United Postal Savings Association*, 567 F.2d 1277, 1281 (5th Cir. 1978) (Florida law) (contract damages must have been reasonably contemplated by the parties at time contract made) *with Chomont v. Ward*, 103 So.2d 635, 638 (Fla. 1958) (tort damages are those proximately caused by defendant's conduct). And in a case like this one, in which the plaintiff was not a party to the contract in question, his tort action depends upon additional proof that the injury was a reasonably foreseeable consequence of the defendant's negligent performance of contractual duties owed to others. *See West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976); *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc.*, 444 So.2d 1068, 1070-72 (Fla. 3rd DCA 1984); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515, 519 (Fla. 4th DCA 1981), *review denied*, 417 So.2d 328 (Fla. 1982).

In addition, in marked contrast to the apparent Wisconsin practice, *see Allis-Chalmers*, 85 L. Ed.2d at 219, the mere commission of a tort in Florida—although a necessary condition for an award of punitive damages, *see Southern Bell Telephone & Telegraph Co. v. Hanft*, 436 So.2d 40, 42 (Fla. 1983); *Lewis v. Guthartz*, 428 So.2d 222, 223-24 (Fla. 1983)—is not sufficient. The plaintiff must also prove that the tort caused some compensatory loss which was not also occasioned by the simultaneous breach of contract, *see Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1106 (11th Cir. 1983) (Florida law); *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229, 237 (Fla. 3rd DCA), *cert. dismissed*, 415 So.2d 1359 (Fla. 1982), and in addition that the tort was committed in a willful, wanton or

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fore, that immediately after the passage quoted by the Union (brief at 16) from *Parrish v. Clark*, 107 Fla. 598, 145 So. 848, 850 (1933), the Florida court says that the two causes of action are "distinct, the only limitation on a suit for either or both being that the same party cannot be compensated twice . . . ."[19]

We must acknowledge, however, that the Union's position does not depend upon its sweeping misstatement of Florida law. The Union's necessary argument is not that the alternative causes of action are identical in all respects, but that both necessarily depend upon a construction of the underlying contract at issue. But though the Union bears the burden of proof on this question, and quotes no less than three Florida cases affirming that a tort action "may" be based upon the negligent breach of a

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reckless way. *See Como Oil Co. v. O'Loughlin*, 466 So.2d 1061, 1062 (Fla. 1985) (per curiam); *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984).

19. Most of the cases cited by the Union (brief at 16), which hark back to the world of common-law pleading, reject defense contentions that the plaintiff was required to proceed only in contract, or only in tort, holding instead that the plaintiff was permitted to plead either claim. *See Holbrook v. City of Sarasota*, 58 So.2d 862 (Fla. 1952); *Doyle v. City of Coral Gables*, 33 So.2d 41 (Fla. 1947); *Parrish v. Clark*, 107 Fla. 598, 145 So. 848 (1933); *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932). They do so, however, not because the two causes of action are identical, but because they are distinct. In the leading case of *Banfield v. Addington*, for example, decided at a time when a married woman in Florida was immune from suit for contract, an action based upon her negligent performance of a contractual obligation was permissible, precisely because it was not tantamount to an action for breach of contract. For the same reason, *Banfield* was precedent for later holdings that where a tort action based on a contract is barred by sovereign immunity, the analogous contract action is not. *Holbrook v. City of Sarasota*, 58 So.2d at 863-64; *Doyle v. City of Coral Gables*, 33 So.2d at 41-42. Thus, the Union has not simply misread a few of the older Florida cases; it has cited them for precisely the opposite proposition for which they stand.

specific contractual obligation, it cites no authority that the common-law duties cognizable in such contexts are **confined** to the contract.[20]

As a general proposition under Florida law, even when the parties have a relationship created by a specific contract, they may also have a relationship, prescribing common-law duties, which exists outside of the contract:

> The duty exists independent of the contract. Existence of a contract may uncontrovertibly establish that the parties owed a duty to each other to use reasonable care in performance of the contract, but it is not an exclusive test of the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff.[21]

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20. The only authority offered (brief at 15) is a "*cf.*" citation to *Vorndran v. Wright*, 367 So.2d 1070 (Fla. 3rd DCA) (per curiam), *cert. denied*, 378 So.2d 350 (Fla. 1979), in which the court held that since the architect did not warrant the performance of his contractor or any sub-contractors in the architect's contract with the property's owner, and since each individual sub-contractor had a statutory duty to comply with safety regulations, the architect had no duty to an employee of a sub-contractor who was injured on the job. Since the only relationship between the architect and the sub-contractor's employee was the primary contract with the owner, that holding was correct. But the case does not remotely suggest that Florida law would recognize no other sources of duty in proper cases.

21. *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689, 691 (Fla. 2nd DCA 1979). *Accord, Rollins, Inc. v. Heller*, 454 So.2d 580, 583 & n.1 (Fla. 3rd DCA 1984), *review denied*, 461 So.2d 114 (Fla. 1985). *See also Robertson v. Deak Perera (Miami), Inc.*, 396 So.2d 749, 752 (Fla. 3rd DCA) (Schwartz, C. J., dissenting) ("A common law duty exists when a court says it does because it thinks it should"), *review denied*, 407 So.2d 1105 (Fla. 1981). Thus, in a case relied upon by the Florida Supreme Court in *Parrish v. Clark*, 145 So. at 850, the Indiana Supreme Court declared that "[w]here the duty has its roots in contract, the undertaking to observe due care

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On its face, therefore, Florida's common law of negligence does not require that Sally Hechler look only to the collective-bargaining agreement as the source of the Union's duties.

From this perspective, it is not difficult to envision Sally Hechler's assertion of duties growing out of her direct relationship with the Union, even apart from her status as a third-party beneficiary of its contract with the Company. It may be that Hechler's membership in the Union alone gave rise to some reasonable expectation that the Union would monitor the Company's job assignments in light of its members' skills. As the Court has noted, "[t]his contractual conception of the relation between a member and his union widely prevails in this country."[22] And

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may be implied from the relationship . . . ." *Flint v. Walling Mfg. Co.*, 167 Ind. 491, 79 N.E. 503, 505 (1906). *See generally* W. Keeton, *Prosser and Keeton on the Law of Torts* §53, at 358-59 (1984).

22. *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958). *Cf. Glades County, Fla. v. Detroit Fidelity and Surety Co.*, 57 F.2d 449, 452 (5th Cir. 1932) (Florida law) ("surety . . . has an interest in the fund as a pledged security which arose out of the contract of suretyship, and which it may assert in its own right and not merely through the principal . . ."). We agree with the Union that under both federal law (*see* brief at 19-20 & n.8) and Florida law (brief at 20 n.9), implied obligations are as much a part of a contract as express obligations. That was a central holding of *Allis-Chalmers* itself, 85 L. Ed.2d at 217-20. But we are not speaking here about obligations implied by the collective-bargaining agreement between the Union and the Company, which are cognizable under §301, but of the obligations running directly from the Union to its members, which in this context are not. *See* discussion *infra*. In passing, however, we also disagree with the Union's suggestion (brief at 19-20) that *Allis-Chalmers* holds that the relationships created by a collective-bargaining agreement must be defined only under §301. They are also defined in the federal system both by unfair-labor-practice proceedings, *see, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), and by fair-

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unless, in such a state suit, "there may be embedded circumstances that could constitute an unfair labor practice" cognizable by the NLRB, *International Association of Machinists v. Gonzales*, 356 U.S. 617, 619 (1957), thus implicating the *Garmon* pre-emption doctrine,[23] there is no reason "to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership . . . ."[24]

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representation proceedings, *see, e.g., DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); and in the state system by all of the state statutes and causes of actions which are not pre-empted. *See, e.g., Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ..... , 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Moreover, this assertion by the Union directly contradicts its later contention (brief at 27) that union/worker relations are defined solely by the duty of fair representation. Both contentions are wrong.

23. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *See Local No. 207, International Association of Bridge Workers v. Perko*, 373 U.S. 701, 707-08 (1963); *Local 100 of the United Association of Journeymen v. Borden*, 373 U.S. 690, 696-98 (1963).

24. *International Association of Machinists v. Gonzales*, 356 U.S. at 620. *Accord, NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973) ("the local law of contracts or voluntary associations usually governs the enforcement of this relationship"); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300-01 (1971) ("The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective-bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of Smith v. Evening News is applicable only to those disputes that are governed by the terms of the collective-bargaining agreement itself"); *Scofield v. NLRB*, 394 U.S. 423, 426 n.3 (1969) ("Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law"). *See Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 303 n.12 (1977). *Cf. United Association of Journeymen v. Local 334*, 452 U.S. 615, 627 n.16 (1981)

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In addition, the state complaint might be based upon obligations voluntarily assumed by the Union in the course of its working relationship with its members. It may be, for example, that Union representatives traditionally undertook to advise members, and especially apprentice members, of the dangers inherent in certain job assignments. It may have been customary for Union representatives to provide or encourage informal on-the-job training to apprentices receiving new assignments. It may be that Union representatives performed the function of screening job assignments for the Company, independently of any contractual duty to do so, and that the Company relied upon their advice on such matters. Or it may be that absent such an arrangement, the Union had undertaken to screen the Company's job assignments, and that the Company routinely acceded to any objections which it raised. Clearly under Florida law, such customary practices give rise to a duty of care.[25]

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(Court need not decide under what circumstances, if any, such actions may be brought under §301). The above-cited cases reflect the recognition that §301 is designed principally to enforce collective-bargaining agreements, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962), and thus governs "agreement[s] between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). *See, e.g., International Union, United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700 (1966) (§301 does cover union's suit against employer for breach of individual contracts with union members). As the above-referenced cases suggest, however, to borrow the Court's language from another context, in most cases an action based on the relationship between an employee and his union is "too attenuated" to invoke §301. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27 n.32 (1983).

25. *See Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932); *Whitehead v. Rizon East Association*, 425 So.2d 627, 629-30 (Fla. 4th DCA 1983); *Fidelity & Casualty Co. v. L.F.E. Corp.*, 382 So.2d 363 (Fla. 2nd DCA 1980).

As a third alternative, Hechler might prove that Union representatives committed some positive act of negligence in connection with her job assignment, like recommending her for the job, or negligently misrepresenting her abilities. Of course, Florida would recognize the Union's responsibility for "positive acts of negligence which arose out of, but were not dependent upon, contractual, or attempted contractual relationships."[26]

Under all three theories, the Union would be responsible for its representatives' negligent performance or nonperformance of "an independent, non-negotiable state imposed duty which does not create . . . problems of contract interpretation . . . ." *Allis-Chalmers,* 85 L. Ed.2d at 219 n. 11. The Union cannot, therefore, sustain its heavy burden of demonstrating that Sally Hechler's state-law complaint must necessarily be based upon an interpretation of its collective-bargaining agreement with the Company.

The Union might argue, however, that if the contract is not inherent in the plaintiff's case, it might well play a part in the Union's defense. One possibility is a defense of comparative negligence,[27] based on Hechler's right to decline an unsafe assignment under the collective-bargain-

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26. *Banfield v. Addington,* 104 Fla. 661, 140 So. 893, 897 (1932). In this context, the Union's duty would be defined "by the scope of the anticipated risks to which the defendant exposes others." *Crislip v. Holland,* 401 So.2d 1115, 1117 (Fla. 4th DCA), *review denied,* 411 So.2d 380 (Fla. 1981). *See Vining v. Avis Rent-A-Car System, Inc.,* 354 So.2d 54 (Fla. 1978) (per curiam). It should be emphasized that none of our three theories make any assumptions about the **Company's** duties under the collective-bargaining agreement, which might require resort to that agreement. To the contrary, they suggest only that the Union could have helped Hechler deal with or avoid her assignment, or could have dealt with the Company through practices developed outside of formal contractual requirements.

27. *See Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973) (adopting defense of comparative negligence in Florida).

ing agreement, and to protest it through grievance procedures. In some other case, involving a collective-bargaining agreement which does not unambiguously create such a right, this prospect would be troublesome, because the union's defense might require resort to the contract. As we have noted, however, the pre-emption doctrine is not concerned with "theoretical disputes but with concrete and specific issues raised by actual cases." *Allen-Bradley Local No. 1111, United Electrical Workers v. Winsconsin Employment Relations Board*, 315 U.S. 740, 746 (1942).[28] In the instant case, Hechler would have no choice but to concede that the agreement gave her such a right, and to suffer any assignment of comparative fault which might attach to her failure to exercise it. There would be no occasion to interpret the collective-bargaining agreement.

The Union might also invoke the agreement as a defense on the question of duty, contending that it positively relieves the Union of any obligation to protect a member's safety in the workplace. At the threshold, however, any such contention would appear inconsistent with the Union's repeated declaration (*e.g.*, brief at 2, 22) that the collective-bargaining agreement does not address its own obligations regarding safety, but only the Company's. Surely the Union would be estopped to take a contrary

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28. As the Court has stated in the removal context, the case must involve an actual "dispute or controversy respecting the validity, construction or effect of [a federal] law, upon the determination of which the result depends." *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), *quoted in Gully v. First National Bank*, 299 U.S. 109, 114 (1936). *Gully* distinguishes "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." 299 U.S. at 118, *quoted in Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. ....., 106 S. Ct. 3229, 3235 n.11, 92 L. Ed.2d 650, 661-62 n.11 (1986).

position upon remand.[29] Moreover, the Union cannot claim that the collective-bargaining agreement **facially** exculpates it from any liabilities to third parties other than those contained or implied in the agreement itself, and thus its defense would fail under the law of Florida, which requires such disclaimers to be explicit, because an "exculpatory clause [is] looked on with disfavor."[30] Moreover, it seems to us inconceivable that Florida or any other jurisdiction would enforce a contract clause exculpating one of the parties from any liability to a **third party** growing out of duties which exist **independent** of the contract. We acknowledge that a third-party beneficiary of a contract who seeks to enforce it may be subject to any defenses which the contract prescribes. But as we have demonstrated, Sally Hechler's claim may well derive from duties independent of the contract, and in pursuing such claims, it is inconceivable that she would be bound by defenses asserted to be implicit in a document to which she is not a party, and upon which she does not rely.[31]

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29. *See generally Hodkin v. Perry*, 88 So.2d 139, 140 (Fla. 1956); *O'Bryan v. Linton*, 41 So.2d 169, 171 (Fla. 1949); *Salcedo v. Associacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3rd DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979).

30. *Van Tuyn v. Zurich American Ins. Co.*, 447 So.2d 318, 320 (Fla. 4th DCA 1984). *See Florida Power & Light Co. v. Mid-Valley, Inc.*, 763 F.2d 1316, 1318 (11th Cir. 1985) (Florida law) (defense of contractual disclaimer requires "an express reference"). *Accord, Van Tuyn v. Zurich American Ins. Co.*, 447 So.2d at 320; *Goyings v. Eckerd Foundation*, 403 So.2d 1144, 1146 (Fla. 2nd DCA 1981). This is a matter of Florida's "public policy." *Charles Poe Masonry v. Spring Lock Scaffolding Co.*, 374 So.2d 487, 489 (Fla. 1979).

31. *See Glades County, Fla. v. Detroit Fidelity & Surety Co.*, 57 F.2d 449, 451 (5th Cir. 1932) (Florida law) (surety of contract between county and general contractor not relieved of duty to pay materialmen and laborers by virtue of county's breach, because surety also undertook obligations running directly to materialmen and laborers). *See also International*

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In citing Florida law on the propriety of this potential defense, we are not begging the question of whether its theoretical availability creates a federal issue requiring pre-emption of the state claim. As the Court stressed in *Allis-Chalmers*, 85 L. Ed.2d at 215-16, §301 does not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . [It] does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. . . . [I]t would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." A state rule limiting exculpatory contractual language does not purport "to define the meaning of the contract relationship," *id.* at 216-17, but to enforce a public policy. *See* note 30, *supra*.

In light of the foregoing, it is evident that Sally Hechler's complaint raises claims which may be litigated free of any need to interpret the collective-bargaining agreement. For this reason, the Union cannot sustain its burden, even assuming *arguendo* that the case was properly removed to federal court, of proving that it necessarily

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Brotherhood of Electrical Workers v. Dave's Electric Service, Inc., 382 F. Supp. 427, 430 (M.D. Fla. 1974) (federal law) (in §301 action, "after the contract is made and that relationship [between promisor, promisee and beneficiary] is established, the rights of the promisee and those of the beneficiary follow separate paths so that intervening defenses may be good against one but not against the other"). *See generally* 4 *Corbin on Contracts* §818, at 274, 276 (1951). In addition, such a broad exculpatory defense might run afoul of §101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. §411(a)(4), providing that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court . . . ." *See Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 687-88 & n.3 (1981).

embraces issues governed by §301, and thus may be pre-empted.[32]

B. Even if Hechler's Complaint Raised Issues Cognizable Only Under §301, the State Court is Capable of Enforcing Federal Law on Those Issues. Even if Hechler's state claim were based solely upon relationships cognizable under §301, there is no reason to assume that the Florida courts would disobey the command of the supremacy clause

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32. This is not to concede that the case was properly removed under the "complete pre-emption" doctrine of *Avco Corp. v. Arrow Lodge No. 735, International Association of Machinists,* 390 U.S. 557 (1968), in which the state action was explicitly based upon the collective-bargaining agreement. *Avco* holds only that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," and that "if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust,* 463 U.S. 1, 22-24 (1983). In this sense, the threshold propriety of removal is dependent upon the substantive propriety of pre-emption. *See Merrell Dow Pharmaceuticals Inc v. Thompson,* 478 U.S. ....., 106 S. Ct. 3229, 3232, 92 L. Ed.2d 650, 658 (1986) (question is whether well-pleaded complaint necessarily arises under federal law); *Franchise Tax,* 463 U.S. at 10 (same); *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914) (same). Because, as we have demonstrated, Hechler's state claim might be prosecuted free of any need to interpret the collective-bargaining agreement, her complaint was not simply an artful attempt to disguise a necessarily-federal claim. *See Pan American Petroleum Corp. v. Superior Court of the State of Delaware,* 366 U.S. 656, 663 (1961) ("The rights as asserted . . . are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation . . ."). At best, therefore, the federal scheme arises in a defensive posture at the Union's instance, which is insufficient to warrant removal. *See Merrell Dow Pharmaceuticals Inc. v. Thompson, supra,* 92 L. Ed.2d at 658, *citing Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149 (1908); *Franchise Tax,* 463 U.S. at 25. And as we have noted, note 28, *supra,* if there is any chance that Hechler's claim may be based on non-federal questions, then removal was inappropriate, because removal is based on disputes that are necessary—not merely possible. This suggests an independent reason for affirming the court of appeals' decision—that the case was not removable in the first place.

and apply state law instead. By the very nature of our federal system, the opposite assumption is appropriate: "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."[33] As the Court noted in *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746, 750 (1942): "Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. . . . It is not sufficient . . . to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights."[34]

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33. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912). *Accord, Testa v. Katt*, 330 U.S. 386, 392, 393 (1947) ("[T]he policy of the federal Act is the prevailing policy in every state"); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) (the state and federal laws "together form one system of jurisprudence, which constitutes the law of the land for the State").

34. *Accord, Ohio Civil Rights Commission v. Dayton Christian Schools*, 54 U.S.L.W. 4860, 4863 (U.S. June 27, 1986) ("[I]t would seem an unusual doctrine, and one not supported by the cited case, to say that the [state] Commission could not construe its own statutory mandate in the light of federal constitutional principles"); *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (refusal to abstain would reflect negatively upon the state court's ability to enforce constitutional principles); *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do"); *Bellotti v. Baird*, 428 U.S. 132, 148 n.16 (1976) ("We assume that the Supreme Judicial Court [of Massachusetts] will do everything in its power to interpret the [state] Act in conformity with its title: 'An Act to protect . . . within present constitutional limits' "); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 512 (1900) ("Congress . . . evidently proceeded upon the supposition (which is a rightful one) that, as by express terms of the constitution, no courts, national or state, would decline to carry into effect the acts of Congress").

In a variety of contexts, the state courts are also trusted to interpret federal law correctly, subject only to the ultimate review of this Court.[35] This deference is reflected in rules requiring the exhaustion of state remedies as a predicate to the collateral assertion of federal rights in federal court;[36] and in rules requiring the presentation of federal issues in state court before their consideration by this Court.[37] It is reflected in the variety of ways in which the states integrate federal law into the prosecution of state-created rights—for example, in the enforcement of state causes of action incorporating duties prescribed by federal statutes;[38] in the availability of federal law as a defense in state actions;[39] in the impermis-

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35. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, *supra* note 32, 92 L. Ed.2d at 663; *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 n.12 (1983); *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 214-15 (1934); *Murdock v. City of Memphis*, 20 Wall. 590 (U.S. 1874).

36. *See Francis v. Henderson*, 425 U.S. 536, 542 (1976); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (exhaustion requirement based on "federal-state comity"), *quoted in Webb v. Webb*, 451 U.S. 493, 500 (1981); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

37. *See Webb v. Webb*, 451 U.S. 493, 499 (1981).

38. *See, e.g., Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 216 (1934) ("Nothing in the [federal act] precluded the state from incorporating in its legislation applicable to local transportation the paramount duty which the [federal act] imposed"); *Louisville & Nashville R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303 (1915) ("The suit is not maintained by virtue of the act of Congress, but by virtue of the Louisiana statute that allows itself to be satisfied by that act"). As we have noted, the state action in *Lucas Flower*, 369 U.S. 95, is also an example, because the state judgment was affirmed by this Court despite its declaration that the state court should have applied federal law on the question of liability, since the outcome was consistent with federal law.

39. *See, e.g., United States v. Equitable Life Assurance Society*, 384 U.S. 323, 330-31 (1966) (priority of federal tax

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sibility of certain state-created defenses in conflict with federal law;[40] and in the limitation of certain state-created remedies by inconsistent federal law.[41]

Such confidence is also shown in the common Congressional delegation to the states of concurrent authority to enforce federal statutes.[42] Indeed, although Congress

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lien in New Jersey foreclosure proceeding determined by federal law); *Free v. Bland*, 369 U.S. 663, 669-71 (1962) (state probate disposition of U.S. savings bond determined by federal regulations; remand to state court with instructions to enforce them); *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959) (in state contract action, "state law governs in general the rights and duties of sellers and purchasers of goods, and . . . the effect of illegality under a federal statute is a matter of federal law"); *United States v. City of New Britain, Connecticut*, 347 U.S. 81, 84 (1954) (in state mortgage foreclosure proceeding, state ruling on perfectability of city lien not binding against federal government); *United States v. Waddill, Holland & Flinn*, 323 U.S. 353, 356-57 (1945) (state rules regarding priority of liens give way to inconsistent federal statute). *Cf. Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (in diversity libel suit, "federal officials are usually governed by local law. . . . Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty . . . or immunity from suit"); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (same).

40. *See Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law"); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) (in diversity case charging price-fixing under state law, defendant not estopped to claim invalidity of the underlying patent despite plaintiff's satisfaction of criteria for estoppel avoidance under state law, because the assertion of such an estoppel avoidance would undermine federal rules concerning patents).

41. *See, e.g., Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 327 (1938) (in diversity case, power to award injunctive relief controlled by applicable federal statute).

42. *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) ("Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court

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has the power to confer exclusive jurisdiction over federal causes of action in federal courts,[43] it has chosen to confer concurrent jurisdiction over §301 actions.[44] As the Court noted in *Charles Dowd Box Co. v. Courtney*, 368 U.S. at 511, "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." The Court added, *id.* at 514:

> It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more

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jurisdiction over cases arising under federal law has been the exception rather than the rule. . . . [The Court will not] disregard this consistent history of hospitable acceptance of concurrent jurisdiction"); *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943) (in state-court action brought under federal statute, federal law controls the standard governing a motion to dismiss); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) ("If an act of Congress gives a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in state court"), *quoted in Testa v. Katt*, 330 U.S. 386, 391 (1947); *United Electrical Workers v. Westinghouse Electric Corp.*, 65 F. Supp. 420, 422 (E.D. Pa. 1946).

43. *See International Longshoremen's Association v. Davis*, 476 U.S. ....., 106 S. Ct. 1904, 90 L. Ed.2d 389, 398 (1986); *Wisconsin Department of Industry v. Gould*, ... U.S. ....., 106 S. Ct. 1057, 88 L. Ed.2d 282 (1986); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900); *Clafin v. Houseman*, 93 U.S. 833, 838 (1876).

44. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). *See also Allis-Chalmers*, 85 L. Ed.2d at 214 n.5; *Humphrey v. Moore*, 375 U.S. 335, 334 & n.6 (1964); *Lucas Flower*, 369 U.S. at 101-02; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.

There is no argument for pre-emption of Hechler's state action, therefore, on the ground that Congress distrusted the states to adjudicate those federal questions inherent in that action. It does not follow, however, that in such cases the state is merely enforcing a federal cause of action, subject to a federal statute of limitations. As the Court noted in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205, 215-16 (1933): "The [federal statute] having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law . . . and was left to be enforced accordingly . . . ."[45]

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45. Thus, for example, when a state statute creates a cause of action based on the violation of a federal statute, "the foundation of the right claimed is a state law, [and] the suit to assert it arises under the state law none the less that the state has attached a condition that only alien legislation can fulfill." *Louisville & Nashville R. Co. v. Western Union Telegraph Co.*, 237 U.S. 300, 303 (1915) (Holmes, J.). The Court continued: "the state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the act of Congress, but by virtue of the [state] statute that allows itself to be satisfied by that act." *Accord, Minneapolis, St. Paul, & S.S.M.R. Co. v. Poplar*, 237 U.S. 369, 372 (1915) ("The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state"); *Shulthis v. McDougal*, 225 U.S. 561, 570 (1912) ("[I]t cannot be held that the case as therein stated [in the plaintiff's complaint] was one arising under the [federal] statutes mentioned"); *Claflin v. Houseman*, 93 U.S. 833, 837-38 (1876) ("The actions which lie in such cases are common law actions. . . . The assignee simply derives his title through a law of the United States"). *See Smith v. Kansas City Title & Trust*

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And this is true even if the action is removable to federal court under 28 U.S.C. §1441(b), because of the federal question which it embraces. Contrary to the Union's assertion (brief at 6 n.2), there is a serious question whether Hechler's action was removable, even if it must be construed necessarily to depend in part upon federal questions.[46] But

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Co., 225 U.S. 180, 214 (1920) (Holmes, J., dissenting) ("It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. . . . [T]he scope of their duty depends upon the character of their corporation and other laws of Missouri. . . . The whole foundation of the duty is Missouri law, which at its sole will incorporated the law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up"). We also refer the Court to the wide range of cases already mentioned, in which a state-created action may depend upon or defer to federal law in some particular aspect, but is governed by state law in all other respects.

46. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. ___, 106 S. Ct. 3229, 92 L. Ed.2d 650 (1986); *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934). *Compare Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Merrell Dow*, 92 L. Ed.2d at 662 n.12, the Court distinguished *Smith* on the ground that the federal issue in question "was the constitutionality of an important federal statute." The Court continued: "In *Moore*, in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action." The same could be said of the instant case, and at the very least, the answer depends on "the dictates of sound judicial policy"—not on simple formulas. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Notwithstanding its presumptive incorporation of a single federal question, Hechler's claim in large measure is "left to be determined by the law of the state." *Minneapolis, St. Paul & S.S.M.R. Co. v. Poplar*, 237 U.S. 369, 372 (1915). And in contrast to *Merrell Dow*, in which no analogous federal claim was available to the plaintiff, *see* 92 L. Ed.2d at 664, this is true even if Hechler pursued her state action notwithstanding an available federal remedy under §301, so long as the federal remedy does not

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even if the state action was removable because it embraces an important federal question, that does not mean that all of the theretofore-state issues—like the amount of damages or the statute of limitations—are suddenly converted into federal questions, which must find their source in some elusive concept of federal common law. To the contrary, where a case is properly removed to federal court, its "jurisdiction extend[s] to the determination of all questions, including questions of state law . . . ."[47]

The instant case, therefore, is fundamentally different from *Allis-Chalmers*—even if it necessarily embraces questions cognizable under §301—because the state court can be expected to apply federal law on those questions. And as the foregoing discussion makes clear, there is nothing inherently impermissible in a state's adoption of federal questions in the enforcement of its own laws: "[I]t is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even though possessing some elements of similarity . . . ."[48] To the contrary, "state law may furnish convenient

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pre-empt even those state claims incorporating federal law—a question we discuss next. We think the court of appeals should have an opportunity to address this difficult question of removal, should this Court determine that Hechler's state claim is permissible in an appropriate forum. If that turns out to be federal court, so be it.

47. *Lincoln Gas & Electric Light Co. v. Lincoln*, 250 U.S. 256, 264 (1919). *Accord, Hurn v. Oursler*, 289 U.S. 238, 242-44 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909).

48. *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912). *Accord, Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 751 (1942) ("Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act

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solutions in no way inconsistent with adequate protection of the federal interest. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[49] In this sense, federal law "is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act." *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 751 (1985).

In *Allis-Chalmers*, the state action was pre-empted not because the state court was incapable upon remand of applying federal law in an "interstitial" way, "supplementing state law here compatible," but because the very existence of the state action—even if based on federal law—would "prevent[] the accomplishment of the purposes of the federal act," by shortcutting grievance and arbitration procedures. It was not the presence of a federal question

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and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained"); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (state and federal statutes harmonious). *Cf. Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law").

49. *United States & Standard Oil Co. of California*, 332 U.S. 301, 310 (1947). *See International Association of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958) ("The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation"). Thus, the court will not presume that Congress intended pre-emption, but will examine the facts of each case. *See Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942). *Cf. Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 749 (1985).

which required pre-emption, but the impermissibility of a state action incorporating that question. As we demonstrate next, there is no similar warrant for pre-emption in this case.

C. The Prosecution of Hechler's State-Law Complaint Will Not Interfere With the Federal Scheme. First, permitting Hechler's action would not deter the use of the pre-injury dispute-resolution procedures available under federal law. If Sally Hechler had appreciated the deadly peril of her assignment, as a mere apprentice, to the surreal chambers of an electrical substation (J.A. 4-5), and if she had studied her collective-bargaining agreement, and if she were willing to risk the ire of her employer, and the ridicule of her fellow employees, she might have refused the job and exercised a variety of options under the collective-bargaining agreement, perhaps culminating in binding arbitration.[50] And if the Union had refused to arbitrate the matter, or had failed to fairly represent Hechler in any arbitration proceeding, she might have sought additional relief in a hybrid §301/unfair-representation claim in federal court—charging that the Union had not ade-

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50. In many ways, the agreement acknowledges the need for special treatment of apprentices (*see* J.A. 8, 10, 13-18). It prohibits the Company from assigning an apprentice to work near energized conductors carrying more than 500 volts (J.A. 17-18). It provides that as a general matter, an employee is not permitted to stop working on account of a grievance (J.A. 13), but that this prohibition does not apply to safety questions, and that "no employee shall be allowed or required to take any undue risk in the performance of his duties which he or his Foreman or Supervisor consider unsafe to himself or to his fellow workers" (J.A. 14). And the contract establishes an elaborate grievance procedure, initiated at the lower stages by the employee, and eventually resulting in binding arbitration if the Union requests it (J.A. 11-13). Absent such a requirement of binding arbitration, Hechler could have sought to enjoin the assignment in a §301-action against the Company. *See Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965).

quately represented her in prosecuting what would have been a meritorious contract claim against the employer.[51] If, **before** her injury, Sally Hechler had forsaken these procedures, and instead had run to state court charging that the Union had acted negligently in allowing her assignment to an unsafe job, she properly would have faced dismissal of her state action as pre-empted by the federal laws.[52]

The fact is, however—for reasons which surely will be litigated below in response to the Union's charge of comparative negligence—Sally Hechler did not protest her assignment. Perhaps she was so unskilled as to be ignorant of her peril. Perhaps she was unaware of her rights under the collective-bargaining agreement. Perhaps she was afraid of ridicule from her co-workers or re-

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51. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163-65 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976); *Vaca v. Sipes*, 386 U.S. 171, 177, 179, 183-88 (1967). The §301 action against the employer is for breach of the collective-bargaining agreement; the fair-representation claim against the union is not based on the collective-bargaining contract, but is a "statutory duty" derived from various provisions of the National Labors Relations Act, 29 U.S.C. §§151-59. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), *citing Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952), *and Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). *Accord, DelCostello v. International Brotherhood of Teamsters*, 462 U.S. at 164 & n.14; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1978). In addition, if the employee has been fired for exercising a contractual right to refuse an unsafe job, he might also charge the employer with an unfair labor practice under §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1). *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

52. Admittedly, this scenario is a bit difficult to envision. Before her injury, the worker has suffered no damages cognizable in tort. In contrast, the federal scheme would give her an immediate forum for protesting the assignment, and for securing review of the grievance process in federal court. Nevertheless, we agree that such an attempt to shortcut the available federal remedy would be pre-empted.

taliation by the Company.[53] Whatever the reason, she did her best at the job, and she suffered horrible injuries as a result. At that point, she had no administrative remedies under the collective-bargaining agreement. She had no grievance to file—no process to protest. And she had no unfair-representation claim against the Union, in the absence of any allegation of arbitrary or discriminatory conduct on its part. *See Vaca v. Sipes*, 386 U.S. 171, 190 (1967). At best she had a suit against the Union under §301, for whatever contract damages she suffered.[54] Thus, in marked contrast to *Allis-Chalmers*, in which the plaintiff sought to avoid an available grievance procedure by proceeding directly to state court, *see* 85 L. Ed.2d at 220-21, Hechler did not circumvent federally-sanctioned dispute-resolution mechanisms by proceeding to state court after

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53. *Cf. Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430-31 (1939) (no defense of assumption-of-risk in admiralty, in part because a seaman cannot be expected to refuse an unsafe assignment).

54. Although this Court has not defined the scope of damages allowable under §301, the lower courts have applied "general contract law." *International Brotherhood of Electrical Workers v. A-1 Electric Service, Inc.*, 531 F.2d 1, 3 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976). That means tangible losses clearly contemplated by the parties at the time the contract was made. *See St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969). *See generally Westinghouse Electric Corp. v. International Brotherhood of Electrical Workers*, 561 F.2d 521, 523 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978); *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 966 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R.*, 338 F.2d 407, 409-10 (10th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965); *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 352 (6th Cir. 1958), *modified on other grounds*, 361 U.S. 459 (1960). In a case like this one, in which the relevant contract provisions specifically concern worker safety, Hechler may have an argument for contract damages. *See* p. 46, *infra*. The point here is that Hechler's post-injury action did not undermine the sanctity of available pre-injury remedies. We will discuss in a moment its compatibility with any federal post-injury remedies.

her injury. Her action did not "usurp those functions which collective-bargaining contracts have properly 'entrusted to the arbitration tribunal.' "[55]

That observation does not end the inquiry, however, because the Court must consider the implications of Hechler's position for future cases. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965). In other contexts, this Court repeatedly has emphasized that the mere availability of preventive federal remedies before suffering an injury does not in itself preclude a state action for redress of injuries already suffered.[56] As we have emphasized, the question is not one of theoretical possibilities, sanctioning a blanket rule, but of practical necessities. Sally Hechler's state action should be forbidden only if it is likely in some context to discourage workers from invoking their preventive remedies under federal law. To put that question, we submit, is to answer it. It is inconceivable that a worker would knowingly risk his life in a dangerous job, knowingly foresaking available preventive remedies, merely because of the assumed availability of a state tort action in the event of injury. It is particularly inconceivable because the very act of doing so—of knowingly encountering an avoidable danger—would itself be a dispositive or nearly-dispositive defense in the state action.

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55. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976), *quoting United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). To borrow the Court's language in a slightly-different context in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 839 (1984), if the worker risks an unsafe job rather than protesting it, the question of his appropriate pre-injury remedy "may [become] moot."

56. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983), *citing Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 298 (1977).

Sally Hechler may have attempted this job because she did not know that she could refuse it; or because she thought she was trained enough for it; or because, a mere apprentice, she was afraid of making waves. But she certainly did not do so because she knew that if she were electrocuted she could sue the Union in state court. And yet, only on that assumption is the allowance of her state action a deterrent to the exercise of federally-sanctioned remedies. It is clear that Hechler's action does not implicate "that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements." *Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 689 (1981).

Second, it might be argued that although the Congress did not explicitly exempt unions from liability for the negligent performance of contractual or common-law duties to their members, it nonetheless intended that unions be free to be negligent toward individual workers in all contexts, because such freedom would better facilitate the unions' performance of their obligations to members as a group. This is the *Machinists* doctrine, under which the absence of explicit Congressional permission or prohibition of a given activity might reflect a purposeful decision to leave the activity unregulated.[57] In an

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57. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *See Baker v. General Motors Corp.*, 54 U.S.L.W. 5037 (U.S. July 2, 1986); *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 746 & n.27 (1985); *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983). The *Garmon* pre-emption doctrine—which in proper cases protects the jurisdiction of the NLRB, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)—has no application here. *See Allis-Chalmers*, 85 L. Ed.2d at 217 n.9; *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), *citing Smith v. Evening News Association*, 371 U.S. 195 (1962).

extended discussion (brief at 9-10, 21-27), the Union contends that because the fair-representation doctrine proscribes only arbitrary or discriminatory conduct by a union toward one of its members, *see Vaca v. Sipes*, 386 U.S. 171 (1967), the prosecution of Hechler's state action "'could undermine [the] careful accommodation' of individual and collective interests that the Court has struck in the fair representation context." Petitioners' Brief at 26, *quoting International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) (punitive damages unavailable in fair-representation case).

But the Union does not explain what federal interest might be served by allowing unions to be negligent in the performance of common-law duties to workers which exist **independent** of the collective-bargaining agreement, and its argument therefore fails at the threshold. The Union says that Hechler's complaint necessarily implicates the fair-representation duty because "[t]he most that the Union could have done with respect to [Hechler's] assignment was grieve it under the grievance-arbitration procedures of the collective bargaining agreement" (brief at 10). On this assumption, the Union claims (*e.g.*, brief at 27) that "the federal duty of fair representation is the sole source of law for the courts to apply in judging a union's conduct in performing its functions as exclusive bargaining representative, including its function in enforcing collective bargaining agreements."[58] But the premise of this argument is false, because, as we have demonstrated, the state may recognize obligations **outside** of a union's "function in enforcing collective bargaining

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58. As we have observed, note 22, *supra*, this assertion directly contradicts the Union's earlier contention (brief at 19-20) that the relationships created by a collective-bargaining agreement must be defined solely under §301.

agreements"—obligations running directly from the union to its members. And although it bears the burden of proof, the Union has not even attempted to explain how the state enforcement of such extrinsic obligations would "deviate from fair-representation principles and develop and apply inconsistent rules of law," which " 'could undermine [the] careful accommodation' of individual and collective interests that the Court has struck in the fair representation context" (brief at 26).[59]

In *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740, 750-51 (1942), the state was permitted to regulate the union's "mass picketing, threats, violence, and the other devices which were here employed [to intimidate other workers] . . . , notwithstanding the Union's claim that the state was interfering with the delicate labor/management balance protected by the federal labor

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59. The only authority offered by the union—*Vaca v. Sipes*, 386 U.S. 171 (1967)—serves only to up-end the strawman which the Union has erected, because it forbade a state-law action in which the employee directly challenged the manner in which the union had represented him in grievance procedures. It was not, as here, based on duties which might exist **outside** of the grievance process. As applied to obligations existing independent of the collective-bargaining agreement, the Union's argument would invoke *Machinists* to abolish the *Garmon* doctrine, *see* note 57, *supra*, in all actions brought by members against their unions, on the theory that no balancing of interests under *Garmon* is appropriate in light of Congress' intention to define the worker/union relationship solely according to the duty of fair representation. It thus would overrule *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), in which *Garmon* did not prevent the worker's state action against his union for discrimination in job-referrals and personal harassment, allegedly because of dissident intra-union activity. It would also overrule the line of cases cited earlier, at note 24, in which the Court permitted state contract actions based on the direct relationship between union and member. Clearly the Union cannot defend its broad assertion that the duty of fair representation is the exclusive rubric under which to judge all aspects of the worker/union relationship.

laws. The state law was permissible because it governed conduct **outside** the parameters of federal regulation, and because its prosecution posed no risk to interests maintained within those parameters: "[W]e fail to see how the [state proscription] impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy." As in *Allen-Bradley*, "we fail to see" how the Union's transgression of pre-grievance obligations existing independent of the collective-bargaining agreement could upset the "delicate balance" maintained in the federal system after grievance procedures have been invoked.[60]

The same conclusion would be appropriate even if Hechler's complaint were based solely on the collective-bargaining agreement, invoking federal §301-law in that context. Even when the state action does concern the union's "function in enforcing collective bargaining agreements," the Union is flatly wrong in declaring (brief at 27) that "the federal duty of fair representation is the sole source of law for the courts to apply in judging [its] conduct . . . ." There is also the collective-bargaining agreement, and as the Union acknowledges (brief at 24), the duty of fair representation derives not from the agree-

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60. *See generally Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (*Machinists* doctrine did not pre-empt state claims by strike replacements against employer for misrepresentation and breach of contract); *Sears, Roebuck and Co. v. San Diego County District Brotherhood of Carpenters*, 436 U.S. 180, 199 n.30 (1978) (*Machinists* no barrier to state trespass action against union); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977) (*Machinists* no barrier to state action for defamation or violent tortious activity).

ment, but from the federal statutory scheme. *See* note 51, *supra*. Especially when the collective-bargaining agreement does not call for binding arbitration,[61] it is both permissible and conceivable that in proper cases the employee may have a contract claim against the union which also implicates its duty of fair representation. In an analogous context, the Court has held that "[t]he authority of the [NLRB] to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301."[62] As the Court said in *Alexander v. Gardner-Denver Co., supra* note 62, 415 U.S. at 52: "Both rights have legally independent origins and are equally available to the aggrieved employee." The same can be said of the employee's right to proceed against the union either in contract or under the fair-representation theory. The Union is plainly wrong, therefore, to suggest that the fair-representation duty is the only federally-sanctioned means of reviewing "its function in enforcing collective bargaining agreements."

The question, then, is whether the enforcement of duties derived from contract, framed under federal law, in a state tort action, somehow represents a greater threat to the "careful accommodation" effected by the fair-representation doctrine than would enforcement of the same duties under §301. The short answer is that the Union has foresaken its burden of arguing the point. There is no reason

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61. *See Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965).

62. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962). *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 170 (1983); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50, 52 (1974); *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967).

why a straight §301-contract action against a union causes any less interference with the fair-representation doctrine than would a proceeding embracing identical federal questions in the context of an independent state cause of action.

We offer by analogy the much-tougher case (because it upheld, against the *Machinists* theory, a state statute requiring minimum mental-health-care benefits in employee health-care plans, a matter of state law) of *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 471 U.S. ....., 105 S. Ct. 2380, 85 L. Ed.2d 728, 749-51 (1985):

> No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
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> Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that each employee covered by the Act would receive" the mandated health care insurance coverage. Barrentine [*v. Arkansas-Best Freight System, Inc.*, 415 U.S. 728, 739]. Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." *Id* at 745 . . . .[63]

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63. We ask the Court to contrast this passage with the Union's indignant declaration (brief at 24-25 n.11) that individual worker rights are indeed central concerns of the labor laws.

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." [*Allis-Chalmers*, 85 L. Ed.2d at 216].
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> The States traditionally have had great latitude under their police power to legislate as " 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " . . . "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples."
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> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act. . . . When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.

In the instant case, no incompatibility exists between federal rules designed to protect the product of equal bargaining power—the collective-bargaining agreement—by enforcing that product in contract, and state rules which protect against the negligent performance of those same contractual obligations, defined under the same set of federal standards. As the Court noted in *United States v. Standard Oil Co. of California*, 332 U.S. 301, 310 (1947), the state system "furnish[es] convenient solutions in no way inconsistent with adequate protection of the federal interest."

Despite its repeated invocation of the delicate balances effected by the federal labor laws, the Union has yet to explain specifically how those balances might conceivably be unsettled by Sally Hechler's prosecution of her state action.[64] To the contrary, as we await the last brief to be filed in the court of last resort, the Union's position continues to depend upon theoretical possibilities—that Hechler's state complaint can only be based upon the collective-bargaining contract; that the state court will defy the supremacy clause and apply state law even to issues cognizable only under §301; and that for some unspecified reason, the federal labor scheme would be undermined by the prosecution of her claim. As we have emphasized repeatedly, neither the burdens attending a motion to dismiss, nor the important values of federalism, nor the specific criteria for pre-emption, will permit such speculation. The opinion of the court of appeals should be affirmed.

II. Even If Hechler Is Limited to a Contract Action Under §301, Her Complaint Was Timely Filed, and Therefore the District Court Erred in Dismissing It.

As the Union acknowledges (brief at 21), even if a state claim is impermissible under *Allis-Chalmers*, it "must either be treated as a §301 claim . . . or dismissed as pre-empted by federal labor-contract law." 85 L. Ed.2d at 221. On that assumption, the Union acknowledges (brief at 21), "[t]his case must therefore either be remanded to [the court of appeals] to decide, *applying federal law principles*, whether the case was properly dismissed by

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64. Of course, the mere financial threat of a money judgment is not enough. *See Bowen v. United States Postal Service*, 459 U.S. 212, 227 (1983).

the district court or, alternatively, this Court must decide that issue" (emphasis in original). The only reason for the district court's dismissal (Pet. App. 1a-5a) was that Hechler's complaint was time-barred under the statute of limitations prescribed in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The Union contends that this Court should order the affirmance of that ruling, even though the court of appeals has not yet addressed the question. We think that the court of appeals should have that opportunity, and that the district court was wrong.

DelCostello was a §301 action against the employer coupled with a fair-representation claim against the union, which followed an arbitration award for the employer. In the absence of a §301 statute of limitations, this Court's task was to " 'borrow' the most suitable statute or other rule of timeliness from some other source." *Id.* at 158. The Court distinguished its earlier decision in *International Union, United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966)—applying the state's 6-year statute governing actions brought on unwritten contracts—because that case "was a straightforward suit under §301 . . . for breach of a collective-bargaining agreement by an employer," which "did not involve any agreement to submit disputes to arbitration . . . ." *DelCostello*, 462 U.S. at 162. The *DelCostello* case, in contrast, was "not a straightforward breach-of-contract suit under §301, as was *Hoosier*, but a hybrid §301/fair representation claim," representing a challenge to the private dispute-resolution system prescribed by the collective-bargaining agreement and endorsed by the labor laws. *Id.* at 165. For that reason, "unlike the claim in Hoosier, [the *DelCostello* claim] has no close analogy in ordinary state law." *Id.* Thus the Court borrowed the six-month limitation period prescribed

by §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), within which to charge unfair labor practices to the NLRB. *Id.* at 169. In the process, the Court stressed "that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods any time state law fails to provide a perfect analogy." *Id.* at 171. To the contrary, "resort to state law remains the norm for borrowing of limitations periods." *Id.* Only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *Id.* at 172.

If the Union is correct that Hechler's sole remedy is a §301 claim against it for breach of contract, then *Hoosier Cardinal* is obviously a far closer analogy than *DelCostello.* Such a claim is not, as in *DelCostello,* 462 U.S. at 165, a challenge to a process of labor-dispute resolution—indeed, Hechler had neither the obligation nor the right to grieve or arbitrate the Union's performance of its obligations under the collective-bargaining agreement—but instead would be "a straightforward breach-of-contract suit under §301, as was Hoosier . . . ."[65] It therefore was timely under Florida's five-year statute of limitations for actions founded on a written contract, §95.11(2)(b), Fla. Stat. (1985), or

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65. *DelCostello,* 462 U.S. at 165. *See International Union of Elevator Constructors v. Home Elevator Co.,* 55 U.S.L.W. 2129 (7th Cir. August 12, 1986); *Daigle v. Gulf State Utilities Co.,* 794 F.2d 974, 977 (5th Cir. 1986).

perhaps under its four-year statute for actions charging negligence, §95.11(3)(a).

In making this point, we are not seeking a merely-pyrrhic victory, in light of the possibility that the contract remedies available under §301 will not encompass Hechler's personal injuries, since they depend on proof that such damages were reasonably contemplated by the parties at the time the contract was made. *See* note 54, *supra*. In cases in which a contract provision is executed in contemplation of some risk of personal injury, the damages for its breach may encompass the compensation of personal injuries.[66] Moreover, this Court has counseled that "§301 is not to be given a narrow reading," *Smith v. Evening News Association*, 371 U.S. 195, 199 (1962), and that "[t]he range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957). We think a persuasive argument can be made that contract terms which expressly address the safety of workers and their workplace were made in contemplation of the possibility of personal injury.[67] And since none of the argu-

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66. *See Corbin on Contracts* §§1017-1019, at 109-24 (1951); 11 *Williston on Contracts* §1341, at 214-23 (3rd ed. 1968). *See, e.g., Holbrook v. City of Sarasota*, 58 So.2d 862 (Fla. 1952) (allowing damages for personal injuries caused by breach of contract for medical care); *Doyle v. City of Coral Gables*, 159 Fla. 802, 33 So.2d 41 (1947) (allowing damages for personal injuries caused by breach of contract between city and bus passenger); *Butts v. County of Dade*, 178 So.2d 592 (Fla. 3rd DCA 1965) (same).

67. In *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557, 561 (1968), the Court "reserve[d] decision" on the court of appeals' declaration that " 'the remedies available in State Courts are limited to the remedies under Federal law.' " And in *Lucas Flower*, 369 U.S. at 97 n.2, the Court observed that the propriety of the state contract damages awarded "is not in issue here." At the least,

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ments advanced here against pre-emption depends on the assumption that Hechler had no contract remedy under §301—but instead suggest that the state tort claim does not offend any federal interest even if a federal post-injury contract remedy does exist—Hechler should not be estopped on remand, if the Court rejects her arguments against pre-emption, to argue for an expansive scope of her federal contract recovery. In any event, the appropriate measure of contract damages has not been addressed in this case by any court, and should await consideration below. At the least, Sally Hechler's §301 claim is not time-barred, and thus the district court erred in dismissing it on that basis.

CONCLUSION

It is respectfully submitted that the decision of the court of appeals should be affirmed. In the alternative, if the court of appeals' opinion on the pre-emption question is reversed, it is respectfully submitted that the Court should either remand the case with instructions that the district court's judgment should be reversed on the issue of the

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Footnote continued—

therefore, the Court has left open the question of whether state law may be available to supplement the remedies provided under §301 itself. *See International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966) (state law may be borrowed as a matter of federal law); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (same). *Compare Wisconsin Department of Industry v. Gould*, ... U.S. ....., 106 S. Ct. 1057, 89 L. Ed.2d 223 (1986) (under *Garmon* rule, state cannot supplement remedies available before the NLRB). If state-created damages are available, then §301 may be broad enough to encompass an action by Hechler against the Union for personal injuries caused by its negligent performance of contractual obligations.

statute of limitations, or remand the case with instructions that the court of appeals consider that issue.

Respectfully submitted,

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